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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 561

JOHN KASPER, *Petitioner,*

v.

STATE OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

J. BENJAMIN SIMMONS
1010 Vermont Avenue, N.W.
Washington 5, D. C.
Attorney for Petitioner

Of Counsel:

HERBERT S. WARD
1010 Vermont Avenue, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1959

No.

JOHN KASPER, *Petitioner*,

v.

STATE OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner prays for a writ of certiorari to the Supreme Court of the State of Tennessee which affirmed judgment of the Criminal Court of Davidson County, Tennessee, finding petitioner guilty of inciting to riot, sentencing him to six months' imprisonment and to pay a fine of Five Hundred Dollars (App. No. 8a).

OPINION BELOW

The opinion of the Court below has not yet been officially reported. Copy of the opinion and judgment are annexed hereto and printed in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on July 27, 1959 (App. No. 8a). A Petition for a Rehearing was denied on September 3, 1959 (App. No. 9a). The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1257 (3).

QUESTION PRESENTED

Are the speeches made and printed material circulated by the petitioner which formed the basis for the charge and conviction of the common law offense of "inciting to riot" protected under the First Amendment of the United States Constitution?

STATEMENT OF THE CASE

The petitioner was convicted of the common law offense of inciting to riot (App. 8a) and sentenced to serve for a period of six (6) months in the Davidson County, Tennessee, workhouse and pay a fine of $500.00 (App. 8a).

The summary of the testimony is covered extensively in the lower Court's opinion so will not be repeated here (App. 1a).

In the Court's opinion, it was stated (App. 6a):

> "The defendant's insistence is that he does not believe in violence and has never at any time advocated violence; that he came here for the purpose of promoting friendly race relations. He admits the general tenor of statements attributed to him by numerous witnesses, but insists he was simply quoting the predictions of others."

A reading of the entire opinion of the Court is urged.

REASON FOR GRANTING THE WRIT

Are the Speeches Made and Printed Material Circulated by the Petitioner Which Formed the Basis for the Charge and Conviction of the Common Law Offense of "Inciting to Riot" Protected Under the First Amendment of the United States Constitution?

Stating the reason for granting the writ another way: "Are the "freedom of speech" and "freedom of press" protections under the first amendment absolute with respect to a prosecution for "inciting to riot" under the common law; the State of Tennessee having no statute making inciting to riot a crime?"

In the case of *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) a Chicago ordinance was judicially interpreted to permit punishment for breach of the peace for a speech which "stirs the public to anger, invites disputes, or bring about a condition of unrest". In that case a riot had actually occurred and the speech in question had in fact "provoked a hostile mob, incited a friendly one, and threatened violence between the two". The Court reversed a conviction under the ordinance and Justice Douglas wrote:

> "A function of free speech under our system of government is to invite dispute. It may, indeed, best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudice and preconceptions and have profound unsettling effect as it presses for acceptance of an idea. This is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

The length to which the Supreme Court has gone in protecting freedom of speech is illustrated in the case of *Yates et al.* v. *United States*, 354 U.S. 298, 77 S. Ct. 1064, and the issues in that case were whether or not it was a violation of the Smith Act:

> ". . . to advocate and teach the duty and necessity of overthrowing the government of the United States by force and violence and (2) to organize as the communist party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit."

This Court held that those persons had the right to advocate the overthrow of our government by force and violence so long as it clearly remained in the realm of advocacy.

In the Court's opinion below it will be noted that the Court stated (App. 5a):

> "At this meeting there was passed out with the name of the defendant (petitioner) on the reverse side of same printed material that stated that these were the last days of peace between the white and negro races and tended to question the motive and sincerity of national, state and county officials and urged that the white people stiffen their backs and prevent integration of schools with their shotguns. There was also passed out by the defendant or those aiding him in the conduct of his meetings and speeches a picture of a negro boy kissing a white girl."

The cases that are pertinent in this connection are *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722; *Dennis* v. *United States*, 341 U.S. 494, 71 S. Ct. 357; *Bridges* v. *California*, 314 U.S. 252, 62

S. Ct. 190; *Schware* v. *New Mexico*, 353 U.S. 232, 77 S. Ct. 752.

In *Konigsberg* v. *State Bar of California*, *supra*, the Court said at page 269:

> "Because of the very nature of our democracy such expressions (an article he wrote saying this Court had sold out to the enemy, meaning fascists) of political views must be permitted. Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not and should not be immune to such criticism." (citing *Bridges* v. *State of California*, *supra*).

In the Dennis case the history of the "clear and present danger rule" is discussed and delineated and this Court apparently agrees with Justice Holmes' statement in *Schenck* v. *United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".

The prosecution in this case proceeded upon the common law offense. There is no statute in Tennessee making inciting to riot a crime. The Tennessee constitution gives even a wider scope in its Bill of Rights than the Bill of Rights to our federal constitution. It would be gravely doubtful if the Tennessee legislature could legally enact a statute making it an offense to "incite to riot" in view of absolute protection its constitution gives on speech and press matters.

Article I, Section 1 of the Declaration of Rights, Constitution of Tennessee, provides:

> "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of those ends they have at all times, an inalienable and indefensible right to alter, reform or abolish the government in such manner as they may think proper."

Section 19, Declaration of Rights, Constitution of Tennessee, provides:

> "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty . . ."

The record in this case shows that the prosecution was based entirely upon the speeches made by the petitioner and the printed material put out in connection with his speeches.

The Court will observe that the entire case against Petitioner is that the modus operandi of the commission of the common law crime of inciting to riot was by oral and printed words. Counsel has examined the cases cited herein and others and believes that the freedom of speech and freedom of the press protections of the First Amendment are absolute in this situation. Tennessee has a written constitution and statutes covering the usual crimes. Petitioner was not charged and convicted of violating any statute of Tennessee, but instead is charged and convicted of a common law crime by written and oral words. Tennessee is a very old state, carved out of the Territory of North Carolina, and its legislature has been active during its history as a state, as a casual glace at its Code will illustrate. But

its legislature has never made "inciting to riot" a crime, and as set forth earlier herein, this is undoubtedly due to the broad protections its written constitution rightly gives these two great freedoms (speech and press).

CONCLUSION

It is the position of the Petitioner that freedom of speech and of the press are absolute so far as forming the basis for an offense known only to the common law. This being a case of first impression so far as Petitioner can ascertain, it is urged that certiorari be granted.

Respectfully submitted,

J. Benjamin Simmons
1010 Vermont Avenue, N.W.
Washington 5, D. C.

Attorney for Petitioner

Of Counsel:

Herbert S. Ward

APPENDIX

Filed July 27, 1959
B. J. Boyd, *Clerk*

OPINION OF THE TENNESSEE SUPREME COURT

JOHN KASPER, *Plaintiff in Error,*

v.

STATE OF TENNESSEE, *Defendant in Error.*

* * * * * * * * * *

Opinion

Plaintiff in error, John Kasper, hereinafter called defendant, was convicted for inciting a riot and sentenced to serve for a period of six months in the Davidson County Workhouse and pay a fine of $500.00.

There have been filed in behalf of defendant 20 assignments of error, some of which overlap, but counsel has not seen fit to file any written brief or argument in support of said assignments of error.

Under assignments 1, 3, 4 and 8 it is insisted that the court erred in not sustaining the motion to quash the array of jurors upon the alleged grounds that they did not comprise a cross section of the County either geographically or economically; that they were a biased and prejudiced panel of jurors holding strong opinions in opposition to defendant; in refusing to grant the motion for change of venue.

We have examined the record thoroughly in this regard and we find absolutely no merit whatever in these insistences. The trial judge heard ample evidence in regard thereto and gave the same most careful attention. Hence we overrule those assignments.

The second assignment of error is that there is no common law offense of inciting to riot because it is al-

leged that the indictment or presentment is based on the common law and that the same has been expressly repealed by the adoption of the State and Federal Constitutions on those subjects and that no legislation covering the subject has been enacted.

There is no merit in this insistence because Art. XI, Sec. 1 of the Constitution of this State expressly provides otherwise and it has been so held in Henley v. State, 98 Tenn., 665, 41 S. W. 352, 39 L. R. A., 126.

Assignments 5, 6 and 7 are that the evidence preponderates against the verdict and in favor of his innocence; the proof fails to show that as many as 3 people were assembled at any time as would be necessary to establish the existence of a riot, that proof fails to show that a riot ever occurred, and if so, in the presence of the defendant.

It thus becomes necessary to refer to the evidence. The State offered the following evidence:

The defendant, a native of New Jersey, and a graduate of Columbia University, Class of 1951, came to Nashville, Tennessee, about the end of July, 1957. At that time there was considerable feeling and unrest among a substantial number of residents of Nashville because of a Federal District Court order requiring the first grades in all City Schools to be integrated upon the opening of September 1957 term of school.

The defendant had appeared before the City School Board in an attempt to prevent integrating the first grade in the public schools. He began making speeches sometime in the early part of August around in various places. It was shown by the testimony of a Mr. Fullerton, a newspaper reporter for the Nashville Tennessean, that at a meeting on the first Sunday in August, 1957, the defendant said in substance "Well; he said that people are getting pretty excited about it (the school opening) and he said,

we don't want any trouble here but people are getting pretty excited. I remembered he said, I had a fellow come up to me and say, "John, Why don't you hang the School Board." He said, "I don't say we should do that" and he said, "another fellow came up to me, John, I have got a shot gun, we might have to use it to defend myself and my family and I can do it." He said, another fellow came up to me and said, "John, I don't want any trouble here but my kids aren't goin to school with Negroes, and if I have some dynamite, I know how to use it."

This witness stated that the defendant kept repeating the above statement in substance and that in all these references that he made to violence he purported to be quoting somebody else and not saying these things himself.

This witness attended another meeting the latter part of the month of the same nature. The defendant continued speaking around in various places before the opening of schools on August 27 for enrollment of pupils. On one of those occasions he spoke in front of the Davidson County Courthouse and on that occasion he made extremely derogatory remarks about Governor Clement, Mayor West and other officials, including the School Board. He said the School Board had a Jew and negroes on it and they were nothing but pushbut'ons for the Mayor. He referred to negro people generally as "niggers" and said the Jews were agitating and promoting this trouble with the negroes to the point where the negroes thought they were better than the people he was speaking to. He said the negro is better than the Jew and that the Jews were Christ killers. Again he said he was not advocating violence but there would be bombings, dynamiting, bloodshed and probably killing but regardless, they were not going to put negroes in our schools. That statement brought on some loud talking and clapping of hands. On this occasion the defendant's hat was passed around among the crowd to take up a collection which defendant said was

to defray the expense of printing literature and the money was turned over to him. The only literature passed out at the first meeting was announcement of the schedule of future meetings. At a subsequent meeting in the same spot, other literature to be referred to hereinafter was passed out.

On August 27, the enrollment date for the schools, the defendant appeared at least five of the schools and made inquiry about the number of negro children registered, if any, and created a disturbance by urging the people not to let their children go in the schools or urging them to withdraw them as a result of which a very substantial number of children were withdraw from each of the schools.

Then on September 9, the day the schools were to begin class, the defendant engaged in the same performance. For instance, at the Caldwell School there were some people there before the defendant arrived and they were quiet. After he arrived and began speaking, the crowd increased and became loud and traffic was blocked so that the police officer made him move on. Defendant in departing told the crowd to follow him to the Buena Vista School. Then at Fehr's School where defendant appeared on September 9, there were 156 pupils there before he came and only 40 afterwards. The mob yelled for the lady principal to come out and they threatened to get her. During the disturbance the colored janitor's automobile was burned. After the crowd had dispersed, the schoolyard was filled with sticks, stones and broken bottles.

This principal definitely testified that parts of the threats made against her were made while the defendant was talking to the crowd asking them to boycott and picket the schools. She named more than 4 people in the crowd.

Then that night of September 9, the big show came off. The meeting started out in front of the War Memorial Building in Nashville but as the crowd grew in size and

were blocking traffic on Capitol Boulevard, the meeting was moved to the steps of the Capitol Building. The crowd was estimated to be in the beginning a little more than 100 but increased to the maximum estimate by some witnesses of 700. At this meeting the defendant spoke his usual line of stating what would happen if the integration was proceeded with but was careful, of course, not to make any statements or threats as to what he would do himself personally. He designated pickets to go to some of the schools; he held up a rope with a noose in the end of it and suggested that a lot of people would like to see Z. Alexander Looby hanged (this latter person being a negro lawyer and a member of the City Government of the City of Nashville). The defendant posed for a picture holding some wooden mallets crossed in his hands, these mallets being the type used by stonemasons.

At this meeting there was passed out with the name of the defendant on the reverse side of same printed material that stated that these were the last days of peace between the white and negro races and tended to question the motive and sincerity of national, state and county officials and urged that the white people stiffen their backs and prevent the integration of schools with their shotguns. There was also passed out by the defendant or those aiding him in the conduct of his meetings and speeches a picture of a negro boy kissing a white girl.

The evidence shows that the crowd reacted to these things as one would expect. Immediately thereafter, according to one witness, at least 150 people who had attended the meeting in front of the Capitol repaired to Fehr School where a riot occurred. The crowd was breaking glass and running all over everything.

About two o'clock A. M. that same night, the Hattie Cotton school was dynamited and partly demolished.

We deem it unnecessary to go into further detail as we are of opinion that there is ample evidence both direct and

circumstantial, to fully support the verdict of the jury. We would like, however, to make this comment. The defendant's insistence is that he does not believe in violence and has never at any time advocated violence; that he came here for the purpose of promoting friendly race relations. He admits the general tenor of statements attributed to him by numerous witnesses, but insists that he was simply quoting predictions by others.

As for his alleged non-violence attitude, it seems to be a case of the voice of Jacob and the hand of Esau. As for race relations, his every move was consistent with and conducive to nothing but disruptive race relations.

Evidently we must overrule these assignments.

Assignments 10 and 14 relate to the refusal of the trial judge to permit counsel for defendant to cross-examine two witnesses relative to their being beaten by police officers and causing them to make statements. The State concedes that this was error but we do not think so under the circumstances of this case. These men did testify that they were beaten by the police and that they were afraid of the police but under questioning by the trial judge, they testified in the absence of the jury that regardless of their claim of having been beaten that what they had said in their statements and in their testimony was the truth. The trial judge was satisfied with their statements that they were telling the truth and he was very careful all through the trial not to get into side issues but to stick strictly to the charge in the indictment. We do not think this was error but even so, in view of all the mass of evidence otherwise, we agree with the State that it is harmless error.

The same thing may be said of assignment 19 with reference to Constable Peek. That is, the trial judge was not interested in Peek's conversation with the defendant when he arrested him and sought to elicit from defendant a

history of his views and theories about Communism, race relations, etc.

Assignments 9, 11 and 12 relate to matters introduced in evidence consisting of a baseball bat, a mallet, etc., found in the car of witness Crimmons after he had been attending the defendant's meetings and about a piece of wire; also a sound film taken of the meeting on the night of September 9 showing the crowd in front of the Capitol.

Crimmons had been associating with the defendant, driving him around and also taking orders from him about picketing. It was proper to put these items found in his car before the jury to let them decide whether they were relevant to the charge in the indictment. The film was also properly authenticated and introduced for whatever it was worth and that also was for the jury. There is some question about the type of wire, whether it was suitable for discharging dynamite, but that is likewise a matter that was for the jury so that we can see no merit in these assignments.

We have examined the other assignments and find no merit in them. There is no doubt in anybody's mind that any citizen has a right to express his opinion about the opinion of the Supreme Court of the United States in the integration cases but the right of free speech is limited just as are all other so-called rights and when one goes beyond a proper expression of opinion and incites to riot, he has gone beyond the area of freedom of speech. The great Justice Oliver Wendell Holmes said that no one has a right to yell "Fire" in a crowded theater when there is no fire.

Before closing we wish to make the following comment. The trial judge made a preliminary statement to counsel that he would confine the evidence strictly to the charge in the indictment and there would not be tolerated any side issues. He enforced this ruling strictly and impartially as

well as humanly possible. It is well that he did for many reasons including the fact that approximately fifty witnesses testified.

The judge commended counsel for the efficiency and propriety of their efforts. We most heartily commend the judge for his fairness and efficiency.

All assignments are overruled and the judgment below is affirmed.

s/ John E. Swepston, *J.*
John E. Swepston, *J.*

SUPREME COURT MINUTES AT NASHVILLE.
M. B. 44, page 782.

John Kasper

v.

State of Tennessee

Davidson Criminal.
Affirmed.

Judgment

Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and upon consideration thereof, the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by that Court that the State of Tennessee recover of John Kasper, the plaintiff in error, for the use of the County of Davidson the sum of $500.00, the fine assessed against John Kasper in

the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the cost of the appeal.

It is further ordered by the Court that the plaintiff in error be confined in the county jail or workhouse of Davidson County, subject to the lawful rules and regulations thereof, for a term of six months and that after expiration of the aforesaid term of imprisonment, he remain in the custody of the Sheriff of Davidson County, until said fine and costs are paid, secured or worked out as required by law, and this cause is remanded to the Criminal Court of Davidson County for the execution of this judgment.

And it appearing that a cash appeal bond in the amount of $2,500.00 was deposited with the Clerk of the Criminal Court of Davidson County, when the defendant, John Kasper, has been taken into custody, the cost of the Court below and of this appeal and the $500.00 fine assessed against the defendant will be paid from said cash bond, as provided in Tennessee Code Annotated, Sec. 40-1234. July 27, 1959.

SUPREME COURT MINUTES AT NASHVILLE,
M. B. 44, page 792.

Davidson Criminal.
Petition to Rehear Denied.

JOHN KASPER

v.

STATE OF TENNESSEE

Order.

This cause coming on further to be heard on a petition to rehear, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of the petitioner. 9/3/59

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JOHN KASPER,
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STATE OF TENNESSEE,
Respondent.

ANSWER

To Petition for Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

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OCTOBER TERM, 1959.

JOHN KASPER,
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STATE OF TENNESSEE,
Respondent.

ANSWER

To Petition for Writ of Certiorari.

MAY IT PLEASE THE COURT:

The petitioner seeks a review by this Honorable Court of an opinion and judgment of the Supreme Court of Tennessee, dated July 27, 1959 (petition to rehear denied October 2, 1959), in the case of John Kasper v. State of Tennessee, not yet officially reported, but unofficially reported in 326 S. W. 2d 664.

JURISDICTION AND QUESTION PRESENTED.

Jurisdiction of this Honorable Court is invoked by authority of Title 28, U. S. C. A. 1257 (3).

Counsel for the State of Tennessee insists that the question presented is whether or not the common law offense of inciting to riot in the State of Tennessee is repugnant to the right of free speech and free press guaranteed by the First Amendment to the Constitution of the United States. Counsel for the petitioner admits on page 3 of the petition that this is another way of stating the issue involved, although "Under Question Presented", he states the problem for solution to be as follows:

> "Are the speeches made and printed material circulated by the petitioner which formed the basis for the charge and conviction of the common law offense of 'inciting to riot' protected under the First Amendment of the United States Constitution?"

Further, in view of the fact that none of the evidence in this cause has been designated as a basis for this petition, it is again insisted that the question involved must be whether or not the common law offense of inciting to riot in this State conflicts with the right of freedom of speech and freedom of the press.

BRIEF AND ARGUMENT.

Cases determined by this Honorable Court and cited by counsel for the petitioner answers this question contrary to the contention of the petitioner. In **Terminiella v. Chicago**, 93 L. ed. 1131, 37 U. S. 1, it was said:

> "The constitutional guaranty of free speech does not prevent the punishment for slanderous, abusive, and offensive utterances which have a tendency to breach the peace. Stromberg v. California, 283 U. S. 359, 368, 75 L. ed. 1117, 1122, 51 S. Ct. 532; Near v. Minnesota, 283 U. S. 697, 708, 711, 712, 75 L. ed. 1357, 1363, 1365, 1366, 51 S. Ct. 625 (distinguished); Thornhill v. Alabama, 310 U. S. 88, 84 L. ed. 1093, 60 S. Ct. 736; Ogren v. Rockford Star Printing Co., 288 Ill. 405, 417, 123 N. E. 587; Murdock v. Pennsylvania, 319 U. S. 105, 87 L. ed. 1292, 63 S. Ct. 870, 882, 891, 156 A. L. R. 81 (distinguished); Thomas v. Collins, 323 U. S. 516, 89 L. ed. 430, 65 S. Ct. 315 (distinguished); Cantwell v. Connecticut, 310 U. S. 296, 308, 84 L. ed. 1213, 1220, 60 S. Ct. 900, 128 A. L. R. 1352; Chaplinsky v. New Hampshire, 315 U. S. 568, 571, 86 L. ed. 1031, 1034, 62 S. Ct. 766; Chicago v. Hunt, 374 Ill. 234, 29 N. E. 2d 86."

This Honorable Court in **Stromberg v. California**, 75 L. ed. 1117, 283 U. S. 359, had this to say with respect to the right of free speech:

> "The right is not an absolute one, and the state in the exercise of its police power may punish the abuse of this freedom. There is no question but that the state may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means."

Counsel for the petitioner has not designated that the indictment in this cause be certified to this Honorable

Court, and the Tennessee Supreme Court did not in its opinion state a clear and concise definition of the offense "inciting to riot". However, it is clear from the Court's opinion and the facts recited therein that the petitioner did intend to incite his followers to riot to prevent the integration of Negro children with white children in public schools of Nashville, Tennessee, by violence and unlawful means. Considering the principles stated in the cases cited above and the facts recited in the Tennessee Supreme Court's opinion, it seems clear that the common law offense of inciting to riot in the State of Tennessee does not contravene the right of free speech as guaranteed by Amendment I, Constitution of the United States.

In view of the foregoing, it is submitted that the petitioner's prayer for a writ of certiorari in this cause should be denied.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

TEF/b

I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to Mr. J. Benjamin Simmons, 1010 Vermont Avenue, N. W., Washington, D. C., on this, the .... day of December, 1959.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.

TEF/b